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No. 04-___

IN THE

Supreme Court of the United States

MARY ANITA BURKHARDT,
Petitioner,

v.

STATE OF OKLAHOMA ET AL.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts denied the Petitioner's right to due process in failing to afford the Petitioner with any judicial findings of fact or conclusions of law with respect to her claims.

2. Whether the lower courts denied the Petitioner's right to due process in failing to afford her with an impartial tribunal in reviewing her claims.

3. Whether the lower courts failed to apply the correct legal standard on causation in a retaliation claim.

4. Whether the lower courts misapplied applicable law relevant to determining when an employee has resigned from her employment.

PARTIES TO THE PROCEEDINGS

Petitioner: Mary Anita Burkhardt

Respondents: State of Oklahoma, ex rel. Department of Rehabilitation Services, and the Merit Protection Commission.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO ADDRESS THE DEPRIVATION OF DUE PROCESS WHICH OCCURS WHEN THE COURTS OF A STATE ABDICATE THEIR RESPONSIBILITY TO MAKE APPROPRIATE FINDINGS OF FACT AND CONCLUSIONS OF LAW	4
II. THIS CASE INVOLVES A SITUATION IN WHICH THE COURTS OF A STATE ARE FAILING TO PROVIDE IMPARTIAL REVIEW OF ADMINISTRATIVE DECISIONS REGARDING ADVERSE EMPLOYMENT ACTIONS TAKEN AGAINST PUBLIC EMPLOYEES	7
III. THIS COURT SHOULD GRANT THIS PETITION TO CORRECT THE LOWER COURT'S FAILURE TO APPLY THE CORRECT LEGAL STANDARD ON CAUSATION IN A RETALIATION CLAIM	7

TABLE OF CONTENTS—Continued

Page

IV. THE COURT SHOULD GRANT THIS PETITION TO CORRECT THE LOWER COURT'S MISAPPLICATION OF APPLICABLE LAW RELEVANT TO DETERMINING WHEN AN EMPLOYEE HAS RESIGNED FROM HER EMPLOYMENT 9

CONCLUSION 11

Appendix A: Orders of the Oklahoma Supreme Court Denying Certiorari 1a

Appendix B: Opinion of the Court of Appeals for the State of Oklahoma 4a

TABLE OF AUTHORITIES

CASES — Page

Brown v. MFC Finance Co. of Oklahoma, 1992 OK CIV APP 54, 838 P.2d 524 (1992) (certiorari denied) 8
Clark Brothers Transportation, Inc. v. Perry, 554 So. 2d 1056 (Ala. Civ. App. 1989) 6
Harline v. Drug Enforcement Admin., 148 F.3d 1199 (10th Cir. 1998) 4
Jaskolka v. City of Manchester, 567 A.2d 549 (N.H. 1989) 6
Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994) 5
Pendleton v. Conoco, Inc., 23 F.3d 281 (10th Cir. 1994) 10
Rogers v. Carleton, 188 Okla. 470, 110 P.2d 908 (1941) 9
Rogers v. City County Health Department of Oklahoma County, 30 Fed. Appx. 883, 2002 WL 241296 (10th Cir. 2002) 10
Simmons v. Wainwright, 462 F.2d 1340 (5th Cir. 1972) 5
Thompson v. Braselton Federal Insulating & Building Materials Co., 203 Okla. 510, 223 P.2d 527 (1950) 6
Tyler v. Original Chili Bowl, Inc., 1997 OK CIV APP 3, 934 P.2d 1106 (1997) 8
United States v. Cirrincione, 780 F.2d 620 (7th Cir. 1985) 4

STATUTES

Okla. Stat. Ann. tit. 75, § 312 5
Okla. Stat. Ann. tit. 75, § 322 ..... 5, 6
28 U.S.C. § 1254 2
Okla. Stat. Ann. tit. 74, § 840-2.5 7

TABLE OF AUTHORITIES—Continued

	Page
Okla. Stat. Ann. tit. 74, § 840-6.2	7
Sup. Ct. R. 13.3	2
U.S. Const. amend. V	2
U.S. Const. amend. XIV	2
42 U.S.C. 1983	5

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No. 03-___

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STATE OF OKLAHOMA ET AL.,
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Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

On July 22, 2003, the Oklahoma Court of Appeals issued its opinion affirming the decision of the trial court, which had affirmed, without any factual or legal findings, two determinations by the Merit Protection Commission ("MPC") to dismiss the Petitioner's appeals of internal grievances she had filed with her employer, the Department of Rehabilitation Services. The opinion of the Oklahoma Court of Civil Appeals is set out in the Appendix. (5a) The Oklahoma Court of Civil Appeals denied a Petition for Rehearing on October 10, 2003. A Petition for Certiorari to the Oklahoma Supreme Court was denied without opinion on January 5, 2004. (1a)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Certiorari to the Oklahoma Supreme Court was denied without opinion on January 5, 2004 (1a), and, thus, this Petition is timely pursuant to Sup. Ct. R. 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or (shall any person) be deprived of life, liberty, or property, without due process of law[.]

The Fourteenth Amendment states in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

The petitioner, Mary Anita Burkhardt ("Petitioner"), filed this action to vindicate her rights as an employee of the State of Oklahoma who was protected by the statutes and rules of the state's merit system. The record establishes that Petitioner worked for the State of Oklahoma for approximately seven years, including her two-year term of service with the Department of Rehabilitation Services ("DRS"). During her employment with the state, Petitioner received seven performance evaluations, including four by DRS. (*See* 5a-6a) Until the events which gave rise to this action, all of Petitioner's employment evaluations indicated that Petitioner performed her job at levels exceeding the applicable standards. Petitioner successfully performed all duties assigned to her and was never terminated from any position she held. Indeed, Lisa Gameson, one of Petitioner's supervisors at DRS, praised Petitioner's job performance in December

1997, only one month before Petitioner reported a duplication of orders and misuse of state funds by Cynthia Crawford, another of Petitioner's supervisors.

Petitioner's retaliation claim is based upon the negative evaluation she was given as a result of her reporting, in January 1998, of her supervisor's misordering of property and misuse of public funds. As the lower court noted, disciplinary proceedings were initiated against Petitioner in April 1998, three months after she had made her report. (17a-18a) The negative evaluation that emerged from such proceedings was issued in August 1998. (17a-20a)

The Court of Civil Appeals found that Petitioner's negative evaluation was not retaliatory because it was completed before Petitioner filed a grievance. (2a-3a) (17a-20a) The record actually demonstrates that Petitioner's claim of retaliation was based upon her January 1998 reporting of the duplicate purchase and alleged misuse of state funds, and not upon her later grievance.

Petitioner filed a grievance based on the negative evaluation, but this grievance was handled in a perfunctory manner from its inception, through the appeal to the District Court. The District Court prepared no findings of fact, nor any conclusions of law. In fact, the Judge before whom this case was presented specifically indicated to counsel for Appellant and Appellee that he did not intend to undertake any independent analysis and that he was "going to let the people on 23rd Street worry about it."[1] (*See* 10a) The Court of Civil Appeals appeared unconcerned by this comment, or by the fact that the court failed to make any findings of facts or conclusions of law.

Thus, Petitioner was subjected to retaliation for fulfilling her duty as a state employee and reporting mismanagement,

---

[1]The Oklahoma Court of Civil Appeals is located on 23rd Street.

and when she filed a grievance based on this retaliation, it was handled perfunctorily. The resulting stress understandably had an effect on Petitioner, and she ultimately decided to just give up—to go along to get along. When she informed her superiors that she was ready to "quit playing ball," however, her supervisors jumped on this statement as a pretext to separate Petitioner from her employment by claiming that she resigned. Petitioner's supervisors were so anxious to get rid of her that they would not even let her return to retrieve her belongings. As discussed infra, Petitioner did not resign and the finding by the Court of Civil Appeals that she did conflicts with applicable law.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO ADDRESS THE DEPRIVATION OF DUE PROCESS WHICH OCCURS WHEN THE COURTS OF A STATE ABDICATE THEIR RESPONSIBILITY TO MAKE APPROPRIATE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

It has been held that a defendant in a criminal proceeding is denied due process when the district court fails to review the evidence and make appropriate findings of fact. *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985). Although the instant case involves the denial of a property interest—public employment—rather than a liberty interest, the same principle should apply.

A public employee with a property interest in her employment is entitled to a hearing before a fair and impartial tribunal. *Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir. 1998). When that tribunal fails to examine the evidence and fails to make appropriate findings, it can hardly be considered fair and impartial. The Petitioner in this case was not given a hearing prior to or subsequent to

her termination. Her first opportunity to present evidence to an independent tribunal was in the Oklahoma trial court. Yet, contrary to fundamental notions of due process and contrary to state law, the trial court stated that it would not review the evidence, and then failed to make any findings. Thus, the trial court completely abdicated its role as a fair and impartial tribunal, and simply rubber-stamped the administrative decision which it was required to review. The district court's abdication of its responsibility and its failure to make any findings required the appellate courts to vacate or reverse the decision. *Cf. Simmons v. Wainwright*, 462 F.2d 1340, 1342 (5th Cir. 1972) ("Because of the district court's failure to enter findings and conclusions with respect to all of the appellant's claims under 42 U.S.C. 1983, we are compelled to vacate the judgment below, and remand the cause.").

Okla. Stat. Ann. tit. 75, § 312 provides that a final agency order adverse to a party must include findings of fact and conclusions of law. On judicial review of an agency order, the reviewing court may set aside the order if the agency's findings are clearly erroneous in view of a consideration of the entire record. Okla. Stat. Ann. tit. 75 § 322(1)(e). Thus, in order to determine whether the agency's findings are clearly erroneous, the reviewing court must consider all the evidence of record. This duty is at odds with the conclusion set forth in the opinion that a court reviewing an administrative order need not issue findings of fact. (10a) Courts considering the issue have held that, because an appellate court is charged with undertaking an independent review of an agency's action, the appellate court is not bound, on an appeal from the trial court's decision, by the trial court's recitation of the facts. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994). The Oklahoma Supreme Court has held that, in reviewing an award of the State Industrial Commission, the Supreme Court will not accept as conclusive the findings of fact made by the Commission, but on review will weigh the evidence and

make its own independent findings of fact. *See Thompson v. Braselton Federal Insulating & Building Materials Co.*, 203 Okla. 510, 223 P.2d 527 (1950). These holdings conflict with the conclusion of the Oklahoma Court of Civil Appeals that an appellate court reviewing an administrative order need not make specific findings of fact. (*See* 10a) *See also Jaskolka v. City of Manchester*, 567 A.2d 549 (N.H. 1989) (trial court was required to make specific findings of fact in order on petition for certiorari from administrative agency's action); *Clark Brothers Transportation, Inc. v. Perry*, 554 So. 2d 1056 (Ala. Civ. App. 1989) (trial court must detail findings of fact in workers' compensation cases).

Okla. Stat. Ann. tit 75, § 322. For these reasons, the Oklahoma Court of Civil Appeals misapplied the law as it pertains to findings of fact on judicial review of an administrative decision, and in so doing, failed to provide relief from the violation of Petitioner's due process rights.

It should also be noted that the evidence does not support the court's interpretation of the trial court's comment, quoted in Note 3 of the opinion. (*See* 10a) The reasonable inference is that the trial court was not concerned with reviewing Petitioner's case, and that the problems with MPC's decision, about which the court was not going to worry, would have to be resolved by the appellate courts. The trial court made this statement during proceedings which the trial court decided to conduct in camera. The trial court's lack of concern with reviewing Petitioner's case was further manifested in the fact that the court's decision was untimely, and came only after Plaintiff's counsel had pressed the matter for about one year.

II. THIS CASE INVOLVES A SITUATION IN WHICH THE COURTS OF A STATE ARE FAILING TO PROVIDE IMPARTIAL REVIEW OF ADMINISTRATIVE DECISIONS REGARDING ADVERSE EMPLOYMENT ACTIONS TAKEN AGAINST PUBLIC EMPLOYEES.

The denial of Petitioner's right to a fair and impartial tribunal is, in itself, a sufficient reason for granting the Writ. Moreover, an initial examination of the history of appellate review of administrative decisions in Oklahoma reveals that there is a pattern of judicial abdication of the responsibility to review administrative decisions involving state employees. Thus, the Oklahoma courts have essentially given the state unbridled authority with respect to the treatment of state employees. Such a judicial abdication is not only contrary to Oklahoma law but is also contrary to fundamental notions of due process.

III. THIS COURT SHOULD GRANT THIS PETITION TO CORRECT THE LOWER COURT'S FAILURE TO APPLY THE CORRECT LEGAL STANDARD ON CAUSATION IN A RETALIATION CLAIM.

The Oklahoma Whistleblower Act provides that no officer or employee of a state agency shall prohibit or take disciplinary action against an employee of such agency for reporting, among other things, mismanagement, a gross waste of public funds, or an abuse of authority. Okla. Stat. Ann. tit. 74, § 840-2.5(B)(2). By contrast, the grievance retaliation statute, Okla. Stat. Ann. tit. 74, § 840-6.2(C), provides that no employee shall be disciplined or otherwise prejudiced in his or her employment for exercising his or her rights under the internal agency grievance resolution procedure. This distinction between these two statutes is critical in the case at bar, given the timing of the proceedings against Petitioner. While

the negative evaluation of Petitioner could not have been caused by her initiation of grievance proceedings because such proceedings were not commenced by Petitioner until September 1998, the agency's commencement of disciplinary action against Petitioner occurred three months *after* Petitioner had filed her report relating to the duplicate ordering and the misuse of state funds. Hence, contrary to the Court of Civil Appeal's conclusion, it makes a tremendous difference which statute is applied to Petitioner's retaliation claims. As the Court of Civil Appeals observed, under prior decisions of the Court of Civil Appeals, the causation element of a retaliation claim requires proof that retaliatory motives comprised a significant factor in the employer's decision to take adverse action against the employee. *See Brown v. MFC Finance Co. of Oklahoma*, 1992 OK CIV APP 54, 838 P.2d 524 (1992) (certiorari denied). The record contains substantial evidence that DRS's negative evaluation of Petitioner was caused in significant part by Petitioner's supervisors' desire to retaliate against Petitioner for her report of ordering irregularities and misuse of state funds. In this respect, the opinion of the Court of Civil Appeals in the instant case is at odds with other decisions which recognize that an employee states a claim for retaliatory termination when he alleges that he was terminated for telling his supervisors about violations of the law. *See Tyler v. Original Chili Bowl, Inc.*, 1997 OK CIV APP 3, 934 P.2d 1106 (1997).

Not long after Petitioner reported the double ordering and began keeping daily records, a memorandum was distributed concerning ethical case management. An investigation ensued, and the ultimate conclusion was that the Petitioner had alerted the agency to a problem which required correction. It is proper to infer that, even if Burkhardt's supervisors were not inclined to retaliate against her as a result of the mere complaint at the end of January, the negative repercussions of an investigation revealing further irregularities provided a further motivation to retaliate against

Petitioner. Petitioner's role in initiating the investigation is no less protected than her original complaint. Thus, the protected activity in which Burkhardt participated continued throughout 1998.

In the case at bar, it was Petitioner's report to her superiors about the ordering discrepancies that provided a substantial basis for her retaliation claim. The court misapplied the law in finding a lack of causation based upon the fact that Petitioner did not file a grievance until after the negative evaluation had been issued.

IV. THE COURT SHOULD GRANT THIS PETITION TO CORRECT THE LOWER COURT'S MISAPPLICATION OF APPLICABLE LAW RELEVANT TO DETERMINING WHEN AN EMPLOYEE HAS RESIGNED FROM HER EMPLOYMENT.

The Court of Civil Appeals erroneously held that Petitioner had resigned her position, and was, therefore, entitled to no protection with respect to her claim of retaliation. In this regard, the court cited *Rogers v. Carleton*, 188 Okla. 470, 110 P.2d 908, 909 (1941), in which the court held that the resignation of a public officer does not become effective until it is accepted by the proper authorities. The court held that, under the particular circumstances of the case, the resignation of the plaintiff, a mayor, could not be revoked:

> On July 18, 1940, he submitted his written resignation to the city commissioners conditioned only that it become effective August 15, 1940. The resignation *was accepted by order of the board* on July 26, 1940. On August 9 the plaintiff filed a written withdrawal of the resignation. On August 17, two days after the effective date of the resignation, the board of commissioners

> issued an order purporting to appoint the defendant to fill the office of mayor allegedly left vacant by the resignation aforesaid.

110 P.2d at 908 (emphasis added); *see also Pendleton v. Conoco, Inc.*, 23 F.3d 281 (10th Cir. 1994) (evidence presented a jury question as to whether employee's statement that he was resigning when he returned from vacation was effective as a current resignation that the employer could accept immediately); *Rogers v. City County Health Department of Oklahoma County*, 30 Fed. Appx. 883, 2002 WL 241296 (10th Cir. 2002) (plaintiff would be deemed to have effectively resigned when she never returned to her job after a second meeting with the defendant).

Applying *Rogers v. Carleton* to the present case, even assuming for the sake of argument that Petitioner's statement constituted a resignation, there is no evidence allowing a conclusion that such resignation was accepted prior to Petitioner's notice to her employer that she had not resigned and her attempt to return to work. The critical issue is the time Petitioner's purported resignation "was accepted" by DRS. The Court noted that Petitioner placed her telephone call to Hopkins and Hurte on the morning of April 14, 1999, and that, at about noon on that date, Hurte drafted a letter to Hopkins stating that Petitioner "terminated her position." (16a-17a) DRS acknowledged Petitioner's resignation in a letter dated April 14, 1999, effective at the close of the business day. (16a-17a) At 2:45 p.m. on April 14, 1999, Petitioner's attorney called Hopkins and told him Petitioner had not resigned. (7a) There is no evidence indicating the time DRS mailed its letter acknowledging Petitioner's resignation. The earliest point at which DRS could have accepted Petitioner's resignation was when the agency mailed its acceptance. In light of the lack of evidence supporting such a finding, the court could not permissibly determine that the letter acknowledging Petitioner's resignation, dated April

14, 1999, was deposited into the mail before 2:45 p.m. on that date, or was even mailed on April 14 at all. In the absence of such evidence, a finding that DRS accepted Petitioner's resignation before she informed her employer that she had not resigned constitutes mere speculation. Accordingly, the court's finding that Petitioner resigned her position with DRS is erroneous and cannot stand.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Mary Anita Burkhardt, requests this Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Filed January 5, 2004]

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

97,357 Calvin Dean Underwood & Jo Ann Underwood v. Phyllis Ann Rich. *Petition for certiorari is denied.*

CONCUR: Watt, C.J., Opala, V.C.J., Lavender, Hargrave, Kauger, Boudreau, Winchester, Edmondson, JJ. NOT VOTING: Hodges, J.

97,685 Hudson Excavation, Inc. v. AGB Capital Properties Inc., d/b/a AGB Capital Construction Co., & Pilot Corporation & HGC Ltd., Partnership & Western Surety Company. *Petition for certiorari is denied.*

CONCUR: Watt, C.J., Opala, V.C.J., Lavender, Hargrave, Kauger, Boudreau, Winchester, Edmondson, JJ. CONCUR IN PART; DISSENT IN PART: Hodges, J.

97,819 Builders Overhead Cranes v. Nashco Building Company, Inc., Walter Nashert III and International Fidelity Insurance Company. *Petition for certiorari is denied.*

CONCUR: Hodges, Hargrave, Kauger, Winchester, Edmondson, JJ. DISSENT: Watt, C.J., Opala, V.C.J., Lavender, Boudreau, JJ.

98,112 (Cons with 98,114) Mary Anita Burkhardt v. Department of Rehabilitation Services & the Merit Protection Commission. *Petition for certiorari is denied.*

ALL JUSTICES CONCUR.

98,199 Entz-Sandrock Farms, etc., et al., v. Land O'Lakes Inc., & the State Board of Agriculture of the State of Oklahoma. *Petition for certiorari is denied.*

CONCUR: Watt, C.J., Opala, V.C.J., Hodges, Lavender, Hargrave, Winchester, JJ.
DISSENT: Kauger, Boudreau, Edmondson, JJ.

98,414 Fabsco Shell & Tube LLC, etc., et al. v. Michael Steve Eubank. *Petition for certiorari is dismissed as untimely.*

CONCUR: Watt, C.J., Hodges, Lavender, Hargrave, Kauger, Winchester, Edmondson, JJ.

DISSENT: Opala (I would deny certiorari), V.C.J., Boudreau (joins Opala, V.C.J.), J.

98,887 Cecil C. Carpenter v. State of Oklahoma, ex rel., Department of Public Safety & Bob Ricks, Commissioner of Public Safety. *Petition for certiorari is denied.*

ALL JUSTICES CONCUR.

I, Michael S. Richie, Clerk of the Appellate Courts of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the *ORDER* in the above entitled cause, as the same remains on file in my office.

In Witness Whereof Thereunto set my hand and affix the Seal of said Court at Oklahoma City, this 15th day of MARCH 2004.

/s/ Joseph M. Watt
JOSEPH M. WATT
CHIEF JUSTICE

Clerk

By /s/ _____
DEPUTY

APPENDIX B

ORIGINAL
NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE
STATE OF OKLAHOMA
DIVISION II

[Filed July 22, 2003]

Case No. 98,112
(cons. with No. 98,114

MARY ANITA BURKHARDT,
Plaintiff/Appellant,

vs.

STATE OF OKLAHOMA, *ex rel.* DEPARTMENT OF REHABILITATION SERVICES, and the MERIT PROTECTION COMMISSION,
Defendant/Appellee.

Appeal from the District Court of
Oklahoma County, Oklahoma

HONORABLE KARL R. GRAY, TRIAL JUDGE

AFFIRMED

James M. Erikson
Oklahoma City, Oklahoma For Plaintiff/Appellant

Honorable Drew Edmondson
ATTORNEY GENERAL
Debra Schwartz
ASSISTANT ATTORNEY GENERAL
Oklahoma City, Oklahoma For Defendant/Appellee

OPINION BY TOM COLBERT, VICE CHIEF JUDGE:

Mary Anita Burkhardt appeals an order of the trial court affirming two final orders of the Merit Protection Commission (MPC). The issue on appeal in this action for retaliation is whether the trial court erred in affirming MPC's orders. We find no error and affirm the trial court's order.

FACTS AND PROCEDURAL HISTORY

Burkhardt began working as a secretary with the Department of Rehabilitation Services (DRS), Division of Visual Services, on October 21, 1996. Sometime between that date and April 1, 1998, Burkhardt began having conflicts with her supervisors, Lisa Gameson, Cynthia Crawford, and Syedah Islam, over various issues relating to office procedures and personality. On August 17, 1998, Gameson, Crawford, and Islam gave Burkhardt a negative performance evaluation for the period of July 1, 1997, through June 30, 1998.

On September 14, 1998, Burkhardt filed an internal grievance protesting the evaluation and alleging violations of several Merit Rules by her supervisors. Burkhardt also alleged that she had been denied access to her personnel file and that her supervisors had given her the negative evaluation in retaliation for her having reported a double order made by Crawford for one of her clients. She stated that she discovered the double order on January 23, 1998.

Raymond Hopkins, Administrator of the Division of Visual Services, met with Burkhardt on October 14, 1998, to discuss her grievance. On October 28, 1998, Hopkins wrote Burkhardt a memorandum explaining that the performance evaluation had been properly conducted; the evaluation was not retaliatory because Burkhardt had not filed a grievance

prior to the time the evaluation was completed;[1] and she had been denied access to unofficial records kept in the district supervisor's office, not her official personnel file. Hopkins stated that he would direct those in control of Burkhardt's unofficial records to allow her to access them.

On November 23, 1998, Burkhardt appealed Hopkins' decision to MPC. James L. Howard, Executive Director of MPC, dismissed the appeal. Howard reasoned that Burkhardt had not provided evidence that any of her rights had been violated nor had she provided evidence of a causal connection between her report of unethical behavior by Crawford and Hopkins' grievance decision.

Burkhardt filed a petition for reconsideration, which Howard denied on February 1, 1999. On March 1, 1999, Burkhardt filed a petition for judicial review pursuant to the Administrative Procedures Act (APA), 75 O.S.2001 & Supp. 2002 §§ 250-323. [Appeal no. 98,112].

On March 17, 1999, Syedah Islam drafted a memorandum, apparently to Linda Parker, Director of DRS, informing Parker of a conversation she had with Burkhardt concerning several written complaints by Burkhardt's co-workers that Burkhardt had made disparaging remarks about the visually impaired. Some of the alleged remarks pertained to one of Burkhardt's superiors. Islam stated that she felt Burkhardt's statements violated DRS's harassment policy.

---

[1] The record contains an October 21, 1998, e-mail message from Mary A. Burkhardt to Raymond Hopkins, informing Hopkins that Cindy Crawford had double ordered an alarm clock for one of her patients in June 1998. There is no evidence that Burkhardt informed Hopkins of any double order by Crawford prior to the filing of the grievance on September 14, 1998. Burkhardt stated, however, that she presented paperwork to Lisa Gameson verifying a double order on or about January 23, 1998, but the paperwork disappeared shortly thereafter.

Upon receiving a copy of the memorandum, Burkhardt wrote Islam a letter explaining that she had not harassed anyone and requesting that secretaries receive training on how to work for persons who are blind. Burkhardt stated that the superior whom she had allegedly harassed, Ani Stevenson, had also harassed her in the past. On April 12, 1999, Hopkins wrote a letter informing Burkhardt that DRS intended to suspend her for two days without pay because her remarks created a hostile working environment and constituted insubordination and unwillingness to perform her job duties, which included reading for and assisting visually impaired co-workers.

Burkhardt received Hopkins' letter before work on the morning of April 14, 1999. After reading it, she called Hopkins and David Hurte, a DRS Senior Vocational Rehabilitation Counselor, and told them she "quit playing ball" and they could find another "flunk[y] to pick on." Around 2:45 p.m., Burkhardt's attorney left Hopkins a voice mail message informing him that Burkhardt had not intended to resign and that her resignation would not be effective until she put it in writing. That same day, Rose King, DRS's Senior Personnel Officer, drafted a letter to Burkhardt acknowledging her resignation. On April 19, 1999, Burkhardt wrote Hopkins a letter of response to the proposed suspension, informing him that she had attempted to return to work each day since April 14th but had been refused entry. Burkhardt also stated that she had not given notice of resignation and would attempt to return to work the following day. She was never permitted to return to work.

Burkhardt filed another appeal with MPC on May 3, 1999, alleging ongoing harassment and retaliation by DRS, protesting DRS's proposed suspension and "lock out," and requesting a formal hearing. On June 15, 1999, Howard dismissed the appeal, stating that Burkhardt had not provided evidence that any of her rights had been violated. Burkhardt

filed a petition for rehearing, which Howard denied on July 27, 1999. On August 24, 1999, Burkhardt filed a second petition for judicial review. [Appeal no. 98,114].

In an order filed on July 15, 2002, the trial court denied the appeals and affirmed both the February 1, 1999, and July 27,1999, final orders of MPC. Burkhardt now appeals to this Court.[2]

STANDARD OF REVIEW

An appellate court may not disturb an order of an administrative agency unless it is erroneous under 75 O.S.2001 § 322. *Okla. Corp. Comm 'n v. Bauer*, 1997 OK CIV APP 83, ¶ 5, 951 P.2d 124, 126. Section 322(1) provides that a court may set aside, modify, or reverse an administrative order if it "determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or decisions, are":

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the agency; or

(c) made upon unlawful procedure; or

(d) affected by other error of law; or

---

[2] Burkhardt has filed two appeals which were made companions by order of the Oklahoma Supreme Court on October 2, 2002. In June 1999, Burkhardt filed suit against DRS in federal court, charging DRS with race-based discrimination and sexual harassment. Burkhardt, who is white, alleged that she was treated differently than non-white DRS employees. She also alleged that several e-mail messages, which had been sent to her on October 19, 1998, by Dennis Williams (another DRS employee who worked in a different location and whom Burkhardt stated she did not know) constituted sexual harassment. DRS reprimanded Williams for his behavior. The outcome of the federal lawsuit, however, is not documented in the record.

> (e) *clearly erroneous* in view of the reliable, material, probative and substantial competent evidence, . . . including matters properly noticed by the agency upon examination and consideration of the entire record as submitted; *but without otherwise substituting its judgment as to the weight of the evidence for that of the agency on question of fact*; or
>
> (f) arbitrary or capricious; or
>
> (g) because findings of fact, upon issues essential to the decision were not made although requested.

75 O.S. 2001 § 322(1) (footnotes omitted; emphasis added). Section 322(3) provides that "[t]he reviewing court shall affirm the order and decision of the agency, if it is found to be valid and the proceedings are free from prejudicial error to the appellant."

In *Tulsa Area Hospital Council, Inc. v. Oral Roberts University*, 1981 OK 29, ¶ 10, 626 P.2d 316, 320, the Oklahoma Supreme Court stated:

> Great weight is to be accorded the expertise of an administrative agency, and a presumption of validity attaches to the exercise of expertise when the administrative agency is reviewed by the judiciary. A court of review may not substitute its own judgment for that of an agency, particularly in the area of expertise which the agency supervises. . . . If the facts determined by the administrative agency are supported by substantial evidence, and the order is otherwise free of error, the decision of the agency must be affirmed.

"On appeal from an administrative decision, the appellate courts, whether the District Court, the Court of Civil Appeals or the Supreme Court, apply the same standards of review directly to the administrative record." *Bauer*, 1997 OK CIV APP 83, ¶ 5, 951 P.2d at 126.

DISCUSSION

I.

Burkhardt first argues that MPC and the trial court both erred in failing to issue findings of fact and conclusions of law pursuant to 75 O.S.2001 § 312(A). The record reveals that MPC did, in fact, issue findings of fact and conclusions of law in response to Burkhardt's appeal. The trial court did not issue findings of fact and conclusions of law, but stated, "The Court having reviewed the transmitted and supplemented records, all motions and attachments thereto, and the brief[s], finds that the appeal should be denied and the administrative agency order affirmed."

Burkhardt has cited no authority which expressly or even impliedly requires a trial court reviewing an administrative order to issue specific findings of fact and conclusions of law. We conclude that, because a trial court acts as an appellate court under section 322, *see Bauer*, 1997 OK CIV APP 83, ¶ 5, 951 P.2d at 126, and any appellate court must apply the same standard directly to the administrative record, the absence of specific findings of fact and conclusions of law in the trial court's order does not constitute reversible error. For this reason, *In re Death of Robinson*, 1985 OK CIV APP 42, 718 P.2d 714, cited by Burkhardt, is not applicable. That case addressed an order of the workers' compensation court, which acts in a different capacity than a trial court reviewing a final order of an administrative agency.[3]

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[3] Burkhardt also asserts that neither MPC nor the trial court engaged in any meaningful review of her case and that the trial judge stated, in chambers, that he was going to "let the people on 23rd Street [presumably, MPC] worry about it." The record fails to support Burkhardt's assertion that her case did not receive meaningful review. Moreover, the statement allegedly made by the trial judge is not a part of the trial court record, and this Court cannot discern the context in which it was made. Therefore, the alleged statement does not show that Burkhardt's case did not receive meaningful review in the trial court.

II.

Burkhardt's next argument appears to be an extension of her first. She argues that MPC's order dismissing her appeal of the proposed suspension does not comply with *Baumgardner v. State, ex rel. Department of Human Services*, 1990 OK 24, 789 P.2d 235, and that the suspension was the product of retaliatory animus.

In *Baumgardner*, the Supreme Court stated that the findings of an agency *acting in its adjudicative capacity* must:

> 1) recite the underlying facts which support the ultimate facts drawn from the evidence;
>
> 2) be free from ambiguity which raises doubt concerning whether the agency's decision is supported by the applicable law and utilized the legal theory correctly; and
>
> 3) be sufficiently specific to enable a reviewing court to ascertain whether the ultimate facts upon which the decision is rested afford a reasonable basis for the order.

Id. at ¶ 6, 789 P.2d at 238. In finding an MPC order insufficient, the Court stated, "The findings of fact give an account of procedural rather than o f ultimate facts. The remaining paragraphs of the order consist of conclusory statements which are unsupported by actual findings of fact." *Id.* at ¶ 7, 789 P.2d at 238. MPC correctly points out that, in dismissing Burkhardt's appeal after an investigation pursuant to section 455:10-7-1(a) of the Oklahoma Administrative Code (OAC), it was not acting in its adjudicatory capacity. Thus, it was not required to issue the type of detailed findings required by the Court in *Baumgardner*.

Burkhardt also asserts that she was not given an opportunity to respond to the suspension notice, in violation of section 455:10-11-15(b) of the OAC. This assertion, however, is inaccurate. Hopkins' April 12, 1999, letter to Burkhardt

informing her of the impending suspension gave her five working days within which to reply. When Burkhardt received the letter on April 14, 1999, she called Hopkins and Hurte and told them she "quit playing ball." Although Burkhardt wrote a letter to Hopkins on August 19, 1999, DRS had already interpreted her April 14th phone calls as a resignation. We conclude that Burkhardt was given an opportunity to respond to the proposed suspension but, due to her actions on April 14th, she responded out of time.

We further conclude that there is substantial evidence in the record to support the basis—harassment—for the suspension. In February and March 1999, Islam received reports from four DRS workers describing remarks by Burkhardt to the effect that she could not cope with working for blind people. Although Burkhardt wrote Islam a letter attempting to explain that her remarks were intended to convey her need for training, rather than bias, we cannot weigh this evidence. Our task is only to search for substantial evidence supporting MPC's decision .[4]

III.

Burkhardt next argues that MPC's first order must be reversed because DRS did not allow her to review her entire personnel file and, therefore, she suffered "irreparable prejudice" in her appeal to MPC. Title 51 O.S.2001 § 24A.7(C) of the Open Records Act states that "[e]xcept as

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[4] Although Burkhardt states in her brief that DRS's initial decision to suspend her was based upon her refusal to work with an intern, Valerie Hamilton, and her unwillingness to read to her visually impaired co-workers/supervisors, it is clear that the primary reason for the suspension was Burkhardt's negative comments about the blind.

Burkhardt also argues that MPC's orders should be reversed because MPC delegated its decision-making authority to an individual investigator. There is nothing in the record to indicate that the investigation was conducted in a manner which is not typical of MPC, and we will not reverse MPC's orders on this basis.

may otherwise be made confidential by statute, an employee of a public body shall have a right of access to his own personnel file." Section 530:10-11-4 of the OAC provides, "Each employee shall have the right to review his or her individual personnel records on file with the employing agency. Such review shall be during regular business hours in accordance with procedures prescribed by the agency."

In his October 28, 1998, response to Burkhardt's initial grievance, Hopkins stated:

> You allege unjust and unequal treatment in your being denied access to your "personnel files" in accordance with OAC 530:10-11-4. The files described in your grievance are those maintained in the district supervisor's office and are not your permanent or official personnel files.
>
> Your official personnel files are maintained in the Human Resources Unit and may be accessed by contacting that unit and making necessary arrangements. The Open Records Act, Title 51 O.S. Section 24A.1 through 24A.18 does not specifically address access to files maintained by supervisors on employees. Though it may be interpreted that there is no legal mandate granting you access to such files, I believe you should have the opportunity to review information which may directly or indirectly concern your performance of assigned job duties. I am directing persons in control of unofficial personnel files concerning you to allow you access to those files. *It will be necessary for you to arrange to view the files at the location where they are housed.*

(Emphasis added.) Although Burkhardt argues that DRS should have informed her when the records were ready for her review, Hopkins' letter clearly placed the onus on Burkhardt to contact those supervisors whom she believed were

keeping unofficial records. Burkhardt filed her appeal with MPC on November 23, 1998, which would have given her several weeks' time within which to request to review the records. There is no evidence in the record that she made any such request prior to filing her appeal with MPC. Moreover, Burkhardt has made no showing here that there was evidence in those purported records which would have supported her position. Thus, we cannot say she has suffered "irreparable prejudice," and we will not reverse MPC's order on this basis.

Burkhardt further argues that MPC's order should be reversed because, during the investigation, Brian Long, MPC's Personnel Analyst, attempted to interview her when her attorney was not present. She asserts that this amounted to a violation of section 455:10-7-2(d) of the OAC, which states in relevant part:

> Parties and witnesses may be interviewed *face-toface or by telephone* to obtain relevant facts and knowledge concerning the issues in dispute. Interviews may be conducted at the Commission office or any other location determined appropriate. A party or witness may have his or her representative in attendance at the interview to act in an advisory role only.

(Emphasis added.) Long called Burkhardt on or about November 25, 1998, and asked her how her rights had been violated under the statutes and rules cited in her appeal. Burkhardt told Long that her attorney possessed that information and, subsequently, Long called Burkhardt's attorney and asked him the same question. The rule permits MPC officials to conduct interviews by telephone and does not require that they ask whether a party's attorney is present before placing the call. Moreover, Burkhardt did not give Long any relevant information. Thus, we cannot say that Long's approach was illegal under section 455:10-7-2(d) or that it warrants reversal of MPC's order.

IV.

Burkhardt next argues that. MPC and the trial court erred in finding that her telephone calls to Hopkins and David Hurte on April 14, 1999, wherein she stated that she had "quit playing ball," and that DRS could find another "flunk[y] to pick on," constituted a resignation. In support of this argument, she cites section 530:10-11-132 of the OAC, which provides:

> *To resign in good standing*, an employee must give the Appointing Authority at least 14 calendar days prior notice unless the Appointing Authority agrees in writing to permit a shorter period of notice. A written resignation shall be supplied by the employee to the Appointing Authority. The Appointing Authority will supply the employee written confirmation of any shorter period of notice that is allowed.

(Italicized emphasis added.) Burkhardt interprets this section to mean that a resignation is not valid unless it is in writing and that any resignation is not final until the employee has received written confirmation of the resignation. However, the clear and unambiguous language of this section provides that an employee must give at least fourteen days notice in writing *if* the employee expects to resign in good standing. It goes without saying, then, that an employee may resign in another fashion, but he or she will not have resigned in good standing. Section 530:10-11-132 simply does not provide that any resignation is not final until an employee has received a written confirmation.

In *Rogers v. Carleton*, 1941 OK 58, ¶ 4, 110 P.2d 908, 909, 188 Okla. 470, the Supreme Court stated that the resignation of a public officer becomes effective when it is accepted by the proper authorities, unless there is a statutory provision to the contrary. In this case, there is no statutory provision to the

contrary. Although Burkhardt was not a public officer, we find *Rogers* instructive.

Burkhardt called Hopkins and Hurte around 9:00 a.m. on April 14, 1999. At 12:46 p.m. on that date, Hurte drafted a letter to Hopkins, stating:

> On the above date, [Burkhardt] terminated her position with [DRS]. Events which lead to the conclusion of the above are as follows:
>
> > At approximately 8:15 AM, [Burkhardt] contacted the office to inform staff of being late for work. Reason given was being in receipt of a Certified Letter from [DRS]. The Post Office in Norman, Oklahoma did not open until 8:30 AM. [Burkhardt] wanted to wait.
> >
> > At approximately 8:55 AM, [Burkhardt] called back to say "I quit, they won, and I do not want to play ball anymore".

Hopkins drafted a memorandum on April 20, 1999, to be placed in DRS's files:

> On April 14, 1999 at approximately 9:00 a.m., [Burkhardt] called on the direct phone line into my office. She stated "you win, I quit". She made an additional statement about my reading about this in her memoirs. As I replied okay, she hung up. I immediately advised Linda Parker [Director of DRS] and we mutually agreed that we should accept the oral resignation from [Burkhardt]. I left the building to attend a meeting but called Rose King while enroute [sic]. Ms. King agreed to send [Burkhardt] our written acceptance of her oral resignation.

In a letter dated April 14, 1999, Rose King acknowledged Burkhardt's resignation, effective at the close of business on that day. Although Burkhardt and her attorney both attempted to rescind the resignation later that day, it is clear that DRS

accepted it at the time Burkhardt called Hopkins and Hurte. MPC weighed these facts in issuing its report, and we cannot reweigh them on appeal. We conclude that there is substantial evidence in the record to support the determination that Burkhardt resigned on April 14, 1999.

V.

Finally, Burkhardt argues that MPC and the trial court both erred in failing to apply the proper analysis of causation in a retaliation claim and that she presented sufficient evidence of causation to sustain her claim of retaliation. Burkhardt relies on several Oklahoma cases which utilize the "significant factor" test or apply a burden-shifting analysis to determine whether an employer's actions were retaliatory. We, however, do not believe it is necessary to engage in lengthy analysis regarding the burden of proof, because our task is to determine whether there is substantial evidence supporting MPC's conclusion that DRS's actions were not retaliatory.[5]

Burkhardt argues that the negative performance evaluation given by her supervisors, DRS's proposed suspension, and DRS's refusal to accept her retraction of her resignation, were

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[5] We also note that the parties do not agree on the applicable statutory provision governing retaliation claims by state employees. Burkhardt relies on 74 O.S. Supp. 2002 § 840-2.5, which is the "Whistleblower Act," and MPC relies on 74 O.S.2001 § 840-6.2, which outlines MPC's grievance procedure. Section 840-6.2(C) provides, "No employee shall be disciplined or otherwise prejudiced in his or her employment for exercising his or her rights under the internal agency grievance resolution procedure." Burkhardt, however, alleges ongoing retaliation based upon her report of a double order made by one of her supervisors, which would invoke section 840-2.5(B)(2) of the Whistleblower Act, which prohibits an employer from retaliating against an employee who reports mismanagement by an agency or one of its employees. Regardless of which statutory provision we apply, however, our analysis will be the same: we must determine whether there is substantial evidence to support MPC's decisions on Burkhardt's appeals.

all done in retaliation for her having reported a double order made by Crawford. As we discussed in part II of this opinion, there is substantial evidence in the record to support DRS's basis for the proposed suspension. There is also substantial evidence to support the determination that the negative performance evaluation was not retaliatory.

DRS initiated informal discipline against Burkhardt in April 1998, pursuant to section 455:10-11-10 of the OAC. On April 1, 1998, Islam and Gameson met with Burkhardt to discuss a conflict between Burkhardt and an intern, Valerie Hamilton. They cautioned Burkhardt about being rude to Hamilton. On May 11, 1998, Islam and Gameson conducted a meeting with both Burkhardt and Hamilton, noted that the conflict continued, and issued another warning to Burkhardt.

On June 1, 1998, Islam, Gameson, and Crawford held another meeting with Burkhardt, after which they and Emmett Eads, DRS's District Supervisor, sent a memorandum to Burkhardt advising her to refrain from making rude or sarcastic comments and warning her the repeated infractions would result in formal discipline. The same day, Islam, Gameson, and Crawford sent Burkhardt a memorandum explaining the manner in which they wanted her to deliver telephone messages. They conducted another meeting with Burkhardt on June 25, 1998, to address her noncompliance with the procedure.

On July 10, 1998, Islam, Gameson, and Crawford conducted a thirty-day review to discuss Burkhardt's compliance with the issues addressed at the June 1 hearing. After the meeting, they drafted another memorandum, also signed by Eads, stating:

> As of this date, there have been continued infractions which include sarcastic comments and notes, insubordination and not following supervisor instruction.
>
> * * *

> Without approval from her supervisors, Mary Anita decided to disregard the instructions outlined in the memo and began to E-mail all telephone messages. On June 25, an informal meeting was held. This meeting included Mary Anita, Cindy, Syedah and Lisa. The meeting was held to instruct Mary Anita to return to the original plan for dissiminating [sic] telephone messages. A copy of this memo was given to her. Mary Anita stated she thought this was "stupid" to follow this memo.
>
> * * *
>
> Additional discussion with Mary Anita included examples of rude or sarcastic comments in which she should refrain. These comments have been documented. Also addressed was the handling of sensitive materials involving client information which could result in a breach of confidentiality.

On the evaluation, signed by all parties in August 1998, Islam, Gameson, and Crawford gave Burkhardt an achievement rating of "Does Not Meet Standards" as to three of her job tasks: filing; supporting and training other staff members; and reading materials to visually impaired employees.[6]

As Burkhardt points out, Hopkins noted in his October 28, 1998, letter that the rating of "Does Not Meet Standards" on the task of reading to visually impaired employees seemed to have been based on mis-communication and he would request

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[6] Burkhardt's supervisors also gave her an achievement rating of "Meets Standards" as to three of her job tasks: completing tasks with an overall accuracy level of 94%-97%; arranging and scheduling services between clients and vendors; and processing claims within two working days. The first two tasks for which Burkhardt received a rating of "Meets Standards" were ranked higher in importance than the three tasks for which Burkhardt received a rating of "Does Not Meet Standards."

that the rating be changed to "Meets Standards" for that particular task. He also noted, however:

> The incident of the double order did not involve each of the individuals responsible for your evaluation and there is no evidence that they conspired to punish you for reporting your discovery. Additionally, there is documentation of concern with your job performance as early as December of 1997 which preceded the discovery of the duplicate equipment order. In conversation with me, you indicated that most of the problems centered around your relationship with the Carl Albert intern who coincidentally initiated her assignment in your office near the time that you disclosed the ordering infraction.

We find that there is substantial evidence showing that the performance evaluation was not the product of retaliation on the part of DRS. Additionally, the evidence supports the conclusion that DRS's refusal to accept Burkhardt's retraction of her resignation was not the product of ongoing retaliation. Having reviewed the record in totality, we find no basis upon which to reverse MPC's orders.

CONCLUSION

There is substantial evidence in the record to support MPC's orders and they are not clearly erroneous under 75 O.S.2001 § 322. Thus, we find no error on the part of the trial court in affirming them.

AFFIRMED.

TAYLOR, P.J., and STUBBLEFIELD, J., concur.

July 22, 2003

I, Michael S, Richie, Clerk of the Appellate Courts of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of *opinion* the in the above entitled cause, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court at Oklahoma City, this 15th day of MARCH 2004.

Clerk

By /s/ _____
DEPUTY